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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

ENTERED
Office of Proceedings

JUL 27 2011

Part of
Public Record

STB Docket No. EP 711

**PETITION FOR RULEMAKING TO ADOPT REVISED
COMPETITIVE SWITCHING RULES**

**REPLY OF NORFOLK SOUTHERN RAILWAY COMPANY
TO THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE'S
PETITION FOR RULEMAKING**

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Norfolk Southern Railway Company ("NS") hereby files this Reply to the Petition for Rulemaking filed by the National Industrial Transportation League ("NITL"). NS hereby joins in the Reply of the Association of American Railroads. Further, Norfolk Southern incorporates to this Reply, as if set forth in full herein, all of its filings, submissions, and testimony in Ex Parte 705.¹

The Board should reject the NITL Petition for Rulemaking because it fails to meet the standards for the Board to grant it. Those standards are set forth in the Board's regulations at 49 CFR 1110.2. A petition that lacks adequate justification will be denied. 49 CFR 1110.2(f). Here, NITL fails to provide an adequate justification. *See Ex Parte 647, Class Exemption for Expedited Abandonment Procedure for Class II and Class III Railroads* (Dec. 15, 2006) (rejecting petition for rulemaking for failure to show that publication is warranted); Finance Docket No. 32467, *National R.R. Passenger Corp. and Consol. Rail Corp. -- Application Under Section 402(a) of the Rail Passenger*

¹ Those filings and testimony include, but are not necessarily limited to: Opening Comments of Norfolk Southern Railway Company (Apr. 12, 2011); Reply Comments of Norfolk Southern Railway Company (May 27, 2011); NS' written hearing submissions and exhibits; the hearing testimony of Mark Manion and James Hixon; and Supplemental Comments of Norfolk Southern Railway Company (July 25, 2011).

Service Act for an Order Fixing Just Compensation (Mar. 24, 1995) (rejecting petition for rulemaking for lack of adequate justification).

First, NITL simply alludes to the record in EP 705 and seemingly concludes that NITL's one-sided account of that record shows some justification that warrants opening a proceeding. NITL presumes that merely repeating the unsubstantiated, self-serving statements made by parties in EP 705 justify further examination of its proposal. However, NITL omits any reference to the substantial and fact-based evidence submitted to rebut those statements. *See, e.g., EP 705 Supplemental Comments of Norfolk Southern Railway Co.* (comparing statements of advocates of forced access to the evidence in the record).

Importantly, no shipper group has answered the fundamental question noticed by the Board in Ex Parte 705 – what would the impacts be of any proposal on rail operations, investment, service, and the public interest. NITL does not attempt to answer that question here, either. The railroads have presented extensive evidence, including verified statements and testimony, discussing the adverse operating consequences of forced switching and other forced access proposals as well as their adverse impact on rail investment. Norfolk Southern itself has extensively discussed these fundamental problems in its filings in Ex Parte 705. This evidence has gone essentially rebutted.

NITL emphasizes the appearance of three Senators who want the Board to do what the Senate has been unable to do itself. Consistent with the rest of its one-sided description of the record in EP 705, NITL omits the fact that dozens of members of both Houses of Congress oppose any action by the Board, including the entire leadership of the House of Representatives Committee on Transportation and Infrastructure.

Second, the NITL proposal is incomplete. Glaringly, it does not address compensation at all. Nor does it address the adverse impacts on rail revenues, rail investment, and rail service. Among the other issues NITL does not address is whether the proposal would apply to hazardous materials in general and to toxic inhalation hazards in particular. NS assumes that NITL would not suggest that its proposal would apply to these commodities given that the record in *Ex Parte 705* clearly established that a substantial changed circumstance in recent years is the extensive government regulation of routes and interchange protocols by various government agencies. *See, e.g., Ex Parte 705 Comments of Norfolk Southern Railway Co.* at 33-34. The new regulation proposed in the Petition could conflict with the Transportation Security Administration's security and handling rules for such traffic and the Pipeline and Hazardous Material Safety Administration's routing regulations that apply to such traffic.

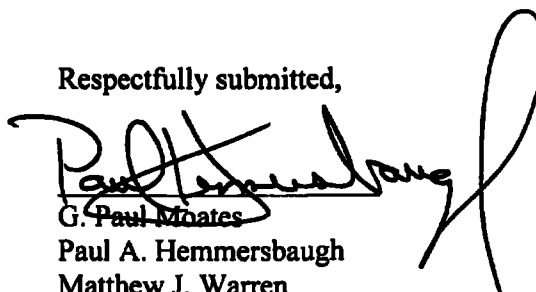
Third, there are also substantial legal hurdles to adopting the NITL proposal – even if it were complete. *See Ex Parte 705 Comments, Reply, and Supplemental Comments of Norfolk Southern.* In addition to the general legal hurdles that exist under Supreme Court precedent, aspects of this proposal themselves would be unlawful under the governing statute. The Association of America Railroads Reply to this Petition notes some of these problems.

CONCLUSION

In sum, NITL has failed to provide an adequate justification for its rulemaking Petition. Accordingly, the Board should deny NITL's Petition for a Rulemaking.

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Respectfully submitted,


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Dated: July 27, 2011

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July, 2011, I caused copies of the foregoing Reply of Norfolk Southern Railway Company to the National Industrial Transportation League's Petition for Rulemaking to be served by first-class mail or more expeditious means on all Parties of Record in STB Ex Parte No. 711.



Eva Mozena Brandon